RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF COLORADO'S BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO FLORIDA'S EXCEPTIONS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Colorado straddles the Continental Divide, where snowmelt from the Rocky Mountains fills the headwaters of many of the nation's major rivers, including the Platte, Arkansas, Rio Grande, and Colorado. *See* Justice Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights through Integrating Tributary Groundwater: Colorado's Experience*, 47 Idaho L. Rev. 5, 9 (2010). These river systems provide water to eighteen different States, a number of Indian Tribes, and the Republic of Mexico.[1] With respect to these and other rivers originating in the State, Colorado has been a party to court proceedings and negotiations that have resulted in nine interstate compacts and two equitable apportionment decrees.[2] Colorado is also

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[1] *See, e.g.*, Convention of May 21, 1906 on the Equitable Distribution of the Waters of the Rio Grande, available at http://www.ibwc.gov/Files/1906Conv.pdf; Treaty between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S. Mex., Feb. 3, 1944, 59 Stat. 1219.

[2] Colorado River Compact, codified at C.R.S. 37-61-101 *et seq.* (2017); Upper Colorado River Compact, codified at C.R.S. 37-62-101 *et seq.* (2017); La Plata River Compact, codified at C.R.S. 37-63-101 *et seq.* (2017); Animas-La Plata Project Compact, codified at C.R.S. 37-64-101 *et seq.* (2017); South Platte River Compact, codified at C.R.S. 37-65-101 *et seq.* (2017); Rio Grande River Compact, codified at C.R.S. 37-66-101 *et seq.* (2017); Republican River Compact, codified at C.R.S. 37-67-101 *et seq.* (2017); Amended Costilla Creek Compact, codified at C.R.S. 37-68-101 *et seq.* (2017); Arkansas River Compact, codified at C.R.S. 37-69-101 *et seq.* (2017); *see also Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

home to several other interstate rivers and streams that are not yet subject to equitable apportionment decrees or compacts.

Given Colorado's long history of navigating the complex legal issues attendant to interstate water disputes, it has a strong interest in the burden of proof that applies in equitable apportionment cases. Accordingly, Colorado submitted an amicus brief before the Special Master addressing that question. Now, Florida takes exception to the Special Master's recommendation that Florida must prove its case by clear and convincing evidence. Fla. Br. in Support of Exceptions at 34. Colorado continues to take no position on the merits of Florida's case. But Colorado remains interested in this dispute because a decision on the burden-of-proof question could potentially inform the limits and extent of Colorado's rights and obligations under its existing equitable apportionment decrees, as well the legal backdrop against which it will be required to apportion water in the future.

SUMMARY OF ARGUMENT

Equitable apportionment of an interstate stream is a complex matter requiring a careful touch. It involves consideration of a wide range of interests, including the sovereign interests of affected States and the health and economic well-being of citizens within those States. For nearly a century, the Court has wrestled with "the problem of apportionment and the

delicate adjustment of interests which must be made." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). Throughout that time, the Court has consistently made clear that the complaining State faces a heavy burden to prove both its injury and its right to relief by clear and convincing evidence. This burden is justified because of the potentially grave consequences of an equitable apportionment decree inadequately supported by the evidence. *See, e.g.*, *Washington v. Oregon*, 297 U.S. 517, 529 (1936) (emphasizing the danger of "destroying possessory interests enjoyed without challenge for over half a century").

The heightened burden for interstate litigation applies throughout the entire course of an equitable apportionment proceeding. This Court has never held, as Florida suggests, that the burden decreases, or "the equation changes," after a complaining State has proven only part of its case, namely, an alleged injury. Fla. Br. in Support of Exceptions at 35. Rather, the harms and benefits that an equitable apportionment is intended to adjust must be quantified by sufficient evidence to allow the Court to credibly weigh them against each other. This means that a State like Florida, which seeks to curtail existing uses through equitable apportionment, must prove by clear and convincing evidence the effectiveness of its proposed remedy. Without this proof, the Court cannot determine the extent to which an equitable apportionment decree would diminish any proven injury or compare that diminishment to the injury that would be inflicted on the defending State by restricting existing uses. If

the Court were to recognize a lower standard of proof in equitable apportionment cases, the result would be entry of incomplete or temporary relief that would require frequent re-adjustment through litigation in this Court. Or, equally concerning, it would cause more disruption to existing economies than would in fact be necessary to alleviate a complaining State's injury. Neither scenario is acceptable in light of the serious magnitude of equitable apportionment actions and the dignity of the Court's original jurisdiction.

ARGUMENT

I. The "clear and convincing evidence" requirement applies at all stages of an equitable apportionment case.

In an equitable apportionment case—as in any dispute between sovereign States—the complaining State must prove its case through "clear and convincing evidence." *Washington*, 297 U.S. at 522. The complaining State's burden is "much greater" than it would be if the suit involved a request for an injunction between private parties. *Id.* at 524; *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931) ("The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."). This burden of proof is intended to be weighty, not only because it appropriately confines the Court's "extraordinary power to

control the conduct of one State at the suit of another," *Connecticut*, 282 U.S. at 669, but also because the consequences of an improperly supported equitable apportionment decree are grave. In the context of equitable apportionment, those consequences can include the disruption—or the outright destruction—of existing economies. *See Washington*, 297 U.S. at 529.

Thus, under this Court's long and unbroken practice, a complaining State must begin by establishing injury by clear and convincing evidence. But this burden does not diminish after an initial showing of injury. To the contrary, this Court has emphasized "the great and serious caution with which it is necessary to approach the inquiry whether *a case is proved*." *Colorado v. Kansas*, 320 U.S. 383, 393 (1943) (emphasis added). Consistent with that caution, this Court has required the complaining State to prove its case by clear and convincing evidence at *every stage*. *See id.* ("Before the court will intervene the case must be of serious magnitude and fully and clearly proved."); *see also id.* at 400 (dismissing Kansas' complaint for failure to meet its burden of proof); *Kansas v. Colorado*, 206 U.S. 46, 124 (1907) (finding that although Colorado's increased consumption diminished flows in the Arkansas River, Kansas failed to meet its burden of proving an injury of sufficient magnitude to justify a decree apportioning flows in the river). And the Court has applied that heavy burden of proof where—as here—a State sought to affect another State's sovereignty and disrupt existing economies by limiting water supply in a way that

might have led to increased future economic production at a different point on the river. *See, e.g.*, *Nebraska*, 325 U.S. at 621 (refusing to limit Colorado's present uses of water and finding "the established economy in Colorado's section of the river basin based on existing uses of water should be protected.").

The importance of this burden of proof is made evident by cases in which a State failed to meet it. Failure to meet the clear-and-convincing burden consistently results in partial or complete dismissal of claims. It does not result instead, as Florida appears to prefer, in partial or approximate apportionment. *See Washington*, 297 U.S. at 529 ("[T]o limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users."); *Nebraska*, 325 U.S. at 621 (refusing to limit Colorado's present uses of water and concluding that "the established economy in Colorado's section of the river basin based on existing uses of water should be protected"); *Colorado v. Kansas*, 320 U.S. 383, 393 (1943) (finding that Kansas failed to meet its burden where a proposed decree apportioning the annual flow of the river would result in unquantified injury to existing agricultural interests upstream in Colorado). The Court has never entered a decree for equitable apportionment where the complaining State has failed to meet the high burden necessary to sustain one.

II. The Court cannot properly weigh the equities without clear and convincing evidence of the benefits and harms that will result from a requested remedy.

When it comes to offering a proposed remedy in an equitable apportionment case, a State must demonstrate by clear and convincing evidence the extent to which the remedy will be effective. It need not prove, as Florida puts it, that the remedy will "redress [the claimed] injury *completely*." Fla. Br. in Support of Exceptions at 28 (emphasis by Florida). But, critically, it must prove, for a proposed reduction in upstream use, what amount of water will consequently be available to diminish any established injury downstream. Only then can the Court begin to weigh the equities of curtailing existing uses upstream to address the alleged harms downstream.

Case law demonstrates the importance of the record to the Court's analysis of whether a State's proposed remedy is justified as a matter of equity. For example, in *Nebraska v. Wyoming*, the Court examined each proposed remedy individually and in the context of the evidentiary record. This led the Court to limit Colorado's *future, additional* uses of water; the Court rejected Colorado's objections to this forward-looking remedy based on the available evidence. *Nebraska*, 325 U.S. at 622 (rejecting Colorado's arguments "as we must on the evidence before us"). But the Court also refused to enjoin Colorado's *existing* uses, even though under state law Nebraska had senior rights downstream on the river. *Id.* at 621 – 22. The Court found

that, based on the record, equity required departure from traditional rules of priority appropriation because strict application of the rule "would work more hardship" on the junior user "than it would bestow benefits" on the senior user. *Id.* at 619; *see also id.* at 624 (refusing to enjoin upstream uses on small tributaries because "practical difficulties of applying restrictions which would reduce the amount of water used by the hundreds of small irrigators would seem to outweigh any slight benefit which senior appropriators might obtain"). Likewise, in *Colorado v. Kansas*, the Court held that Kansas failed to meet its burden of proof by clear and convincing evidence where the record demonstrated that "a decree [apportioning the annual flow of the river], or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado[,]" but was insufficient to establish the magnitude of the injury to Colorado or the benefit to Kansas. 320 U.S. at 394. And in *Washington v. Oregon*, the Court dismissed Oregon's complaint for equitable apportionment after finding that it had failed to establish that its proposed limitation would make additional water available for its use downstream. 297 U.S. at 523 (dismissing complaint based in part on Special Master's finding that "[t]here is evidence that this quantity, small at the beginning, would be quickly absorbed and lost in the deep gravel beneath the channel"). Thus, there was no clear proof of a downstream benefit to offset the harms that would be inflicted by limiting uses upstream. *Id.* ("To limit the long established use in Oregon would materially

injure Oregon users without a compensating benefit to Washington users.").

Of course, the nature of the evidence supporting a particular remedy will vary considerably depending on the facts of each case. Relevant factors might include "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits of downstream areas if a limitation is imposed on the former." *Nebraska*, 325 U.S. at 618. The multitude of potentially relevant considerations only underscores the importance of the burden of proof. When considering each of these factors and balancing them against each other, the Court must be confident that its understanding of them is accurate.

Here, one set of relevant factors turns on how the federal government's "operat[ion of] five dams and three storage reservoirs on the Chattahoochee River" might affect any remedy this Court might order. Fla. Br. in Support of Exceptions at 17. It matters not that those intervening uses are reservoirs operated by a federal agency (here, the Army Corps of Engineers),[3]

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[3] Florida's Brief implies that in western States, the United States owns and has authority to apportion water among States or to determine water rights. Fla. Br. in Support of Exceptions at 17 (citing U.S. Opp. to Ga.'s Mot. to Dismiss 4 (Mar. 11, 2015)). That argument is not only unsupported by Florida's cited authority, but is contrary to the Court's many decisions affirming

instead of irrigation ditches operated by farmers. *Nebraska*, 325 U.S. at 618. Florida, the State seeking to curtail existing upstream uses, must prove by clear and convincing evidence the impact of intervening structures and their operation on the ultimate effectiveness of the remedy downstream.

This is not to say that a downstream State must prove with certainty that it will receive all of the water not consumed upstream; that will rarely be possible. Instead, it must prove its case so that the Court can reliably compare "the damage to upstream areas [. . .] to the benefits of downstream areas if a limitation is imposed on the former." *Nebraska*, 325 U.S. at 618. In some cases, this could require proving how much water would arrive downstream at agricultural headgates during the irrigation season and the effects of those flows on crop productivity. Here, it requires proving—as a result of proposed limitations—how much water would arrive in the Apalachicola Bay during dry periods and the effects of those additional flows on salinity in the Bay and oyster fishing.

Without evidence at that level of specificity, the Court simply cannot conduct the balancing inquiry it

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Congressional deference to State laws regarding the appropriation and administration of water rights. *E.g.*, *California v. United States*, 438 U.S. 645, 653 (1978) ("The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.").

is required to conduct with the requisite level of confidence that the outcome of its analysis would be correct. Simply proving that *some* additional water might arrive in the downstream State, *e.g.*, Fla. Br. in Support of Exceptions at 26, does not justify use of the Court's "extraordinary power to control the conduct of one State at the suit of another," *Connecticut*, 282 U.S. at 669. Nor does it justify disruption of an existing economy. *Washington*, 297 U.S. at 529.

If the Court were to abandon its longtime requirement that a State prove the effectiveness of its proposed remedy by clear and convincing evidence—and instead allow States like Florida to obtain equitable apportionment decrees on the theory that they are willing to "take whatever the Court is willing to give us"—the results would be ruinous in at least two ways. First, apportioning flows without clear and convincing evidence of the probable results would often either fail to redress the injury or only partially or temporarily do so. The complaining State would then be required to repeatedly return to the Court to seek additional reapportionment in order to more completely or more permanently address its alleged harms. Such piecemeal and temporary relief does not comport with the serious magnitude of equitable apportionment actions or the dignity of the Court's original jurisdiction. Second, the Court risks imposing a burden on the upstream State that is far greater than necessary to alleviate any proven downstream injury. This would unnecessarily, and inequitably, disrupt economies in the upstream

State and limit the State's sovereign authority to regulate and administer water resources over which it would otherwise retain control.

III. The Court's past decisions in a dispute between Colorado and New Mexico do not modify the burden of proof applicable to a complaining State.

In the 1980s, the Court issued two decisions in an interstate water dispute between Colorado and New Mexico. *Colorado v. New Mexico I*, 459 U.S. 176 (1982); *Colorado v. New Mexico II*, 467 U.S. 310 (1984). Florida relies on those decisions as support for its theory that "where the downstream State . . . establish[es] injury, the burden shift[s] to the upstream state." Fla. Br. in Support of Exceptions at 36 n.8. But those cases do not support Florida's novel theory—if anything, they tend to undermine it.

As an initial matter, however, those cases involved a different water law doctrine and thus, their "guiding principles" were different from those that apply to this case. Equitable apportionment must be informed by the affected States' laws governing rights to the use of waters. *See Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). That is true regardless of whether the relevant States follow the common-law doctrine of riparian rights (as here) or the law of prior appropriation (as do the States that were involved in the *Colorado v. New Mexico* cases). *See Wyoming v. Colorado*, 259 U.S. 419, 458 – 59 (1922). Under the riparian rights

system—commonly followed by Eastern, Midwestern, and Southern States—the "fundamental principle" is that "each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use." *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945). In contrast, many Western States (including Colorado and New Mexico) follow the rule of prior appropriation, whereby a water user acquires a continuing right to use water by diverting it from the stream and applying it to beneficial use. *Wyoming*, 259 U.S. at 459. As between different appropriators on the same stream, the one first in time has a superior right. *Id.* Thus, in *Colorado v. New Mexico I*, the Court reiterated that, where both States recognize the doctrine of prior appropriation, that doctrine becomes the "guiding principle" in an allocation between the States. 459 U.S. at 183 – 84. Georgia and Florida follow riparian law, and the Court should take care to heed the important distinctions between the two water law systems in applying its decisions in *Colorado v. New Mexico I* and *II* to the facts at hand.

With that important distinction in mind, the *Colorado v. New Mexico* cases in fact undermine Florida's burden-shifting theory, for two reasons.

First, the *Colorado v. New Mexico* cases involved a proposed *future* diversion, not, like here, a request to curtail *existing* diversions. Only under those circumstances did the Court require Colorado to prove that

either the benefit of its proposed diversions would outweigh the harm to existing users in New Mexico or that the harm to those users could be offset. *Colorado v. New Mexico I*, 459 U.S. at 187 n.13; *see also Colorado v. New Mexico II*, 467 U.S. at 324 (holding that Colorado failed to prove the potential benefits of its proposed diversion and that "the equities compel the continued protection of existing users of the Vermejo River's waters").

Second, in the *Colorado v. New Mexico* cases, the upstream State (Colorado) had asked the Court to determine that equity justified *departure* from the applicable principles of prior appropriation. Specifically, despite the fact that both Colorado and New Mexico follow the doctrine of prior appropriation, Colorado requested that it be allowed to develop a new use that New Mexico proved would injure its water users. *Colorado v. New Mexico I*, 459 U.S. at 178 – 79. In that context, the Court held that Colorado bore the burden to prove that its proposed diversion both justified a departure from the States' laws governing water administration and justified the proven harm that would result from the diversion. *Id.* at 187. It is not the case that Colorado bore the burden of proof simply because "the downstream State . . . had established injury." Fla. Br. in Support of Exceptions at 36 n.8. Put in terms of this case, Colorado more closely resembled Florida (the party seeking to alter the status quo) than Georgia (the party seeking to protect the status quo).

IV. An upstream State has no duty to protect or augment flows for the benefit of a downstream State in the absence of an interstate compact or equitable apportionment decree.

Florida quotes *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) for the proposition that an upstream State has an affirmative duty to protect or even "augment" stream flows for the benefit of the downstream State. Florida's Br. in Support of Exceptions at 28 – 29 (quoting *Idaho*, 462 U.S. at 1025). This broad assertion is incorrect. In the absence of a decreed equitable apportionment or interstate compact, an upstream State has no general affirmative duty to protect flows for the benefit of a downstream State. Rather, whether and to what extent a downstream State is entitled to streamflow depends on the equitable apportionment that is ultimately effectuated. For three reasons, Florida's argument is misplaced.

First, the quoted statement from *Idaho ex rel. Evans* is dicta, not a holding. The Court did not impose a duty on any State to "conserve" or "augment" resources within its borders for the benefit of another State. Instead, it held that Idaho failed to meet its burden of proof and dismissed Idaho's request for equitable apportionment. *Idaho*, 462 U.S. at 1029 ("[W]e adopt the Special Master's recommendation and dismiss the action without prejudice to the right of Idaho to bring new proceedings whenever it shall appear that it is being deprived of its equitable share of anadromous fish.").

either the benefit of its proposed diversions would outweigh the harm to existing users in New Mexico or that the harm to those users could be offset. *Colorado v. New Mexico I*, 459 U.S. at 187 n.13; *see also Colorado v. New Mexico II*, 467 U.S. at 324 (holding that Colorado failed to prove the potential benefits of its proposed diversion and that "the equities compel the continued protection of existing users of the Vermejo River's waters").

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Second, neither of the two cases that the *Idaho ex rel. Evans* Court cited in support of its dicta—*Wyoming v. Colorado*, 259 U.S. 419 (1922) and *Colorado v. New Mexico I*—stands for the proposition that an upstream State has an affirmative duty to protect or augment stream flows for the benefit of the downstream State. *See Idaho ex rel. Evans*, 462 U.S. at 1025.

In *Wyoming v. Colorado*, the Court's holding was quite the contrary; it held that downstream water rights in Wyoming and Nebraska had to yield to the countervailing equities of an established economy upstream in Colorado. 259 U.S. at 485 – 86. Rather than requiring Colorado to augment the flow of the Laramie River, the Court instead allowed Colorado to *divert* the remaining dependable supply of the river. *Id.* And while the Court considered the effects of conservation on the dependable flow, it did so in the context of conservation efforts by both States, not just the upstream State. 259 U.S. at 484; *see also Colorado v. New Mexico I*, 459 U.S. at 185 ("[W]e placed on *each* State the duty to employ 'financially and physically feasible' measures 'adapted to conserving and equalizing the natural flow.'" (emphasis added) (quoting *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922))). As the Court made clear, "[t]he question . . . is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream." *Wyoming v. Colorado*, 259 U.S. at 484.

Likewise, in *Colorado v. New Mexico I* the Court did not impose a duty on the upstream State (Colorado) to conserve or augment stream flows for the

benefit of the downstream State (New Mexico). Instead, in evaluating the harms and benefits to each affected State, the Court considered whether conservation efforts by the *downstream* State might offset injury *in that State*. 459 U.S. at 186. As to the upstream State, the Court asked only whether it had undertaken "reasonable steps" to minimize the amount of diversion that would be required. *Id.* In no event do the decisions in *Wyoming v. Colorado* or *Colorado v. New Mexico I* support the broad proposition that Florida now advances.

Third, if Florida's argument were adopted, it would inappropriately elevate one State's sovereign rights above another's. By arguing that an upstream State has an affirmative duty to conserve and augment stream flows for the benefit of the downstream State, Florida asks the Court to prioritize a downstream State's sovereign right to apportion water within its borders over the upstream State's sovereign rights to use water within its borders. That would be contrary to the Court's long history of equitable apportionment, which has cautiously sought the delicate adjustment of interests only upon the clearest showing of injury and the right to relief. *See Nebraska v. Wyoming*, 325 U.S. at 618; *see also Washington v. Oregon*, 297 U.S. at 524; *Connecticut v. Massachusetts*, 282 U.S. at 670.

CONCLUSION

Only after a complaining State has clearly proven the effectiveness of its proposed remedy can the Court

begin to weigh the equities involved with apportionment. If the Court is uncertain to what extent the remedy will diminish the alleged injury, then the Court cannot properly balance the diminishment of injury against the harm that will result to the upstream State from reducing its consumption. In recognition of the seriousness of the exercise of this Court's original jurisdiction, the Court should continue to enforce the requirement that a complaining State prove its entire case by clear and convincing evidence.

Respectfully submitted,

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